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No. 87-231

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In The
Supreme Court of the United States
October Term, 1986

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BOB STOVER,

Plaintiff-Petitioner,

vs.

JOURNAL PUBLISHING CO.,
ALBUQUERQUE PUBLISHING CO.,
AND THOMPSON H. LANG,

Defendants-Respondents.

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RESPONSE TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the New Mexico Court of Appeals' interpretation of New Mexico's report privilege to protect a newspaper's fair and accurate report of a judicial proceeding to which it is a party, including statements made by a witness discovered by the newspaper, presents any federal constitutional claim or right appropriate for review under 28 U.S.C. § 1257(3).

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES iii

QUESTION PRESENTED FOR REVIEW i

STATEMENT OF THE CASE 1

ARGUMENT 7

I. The decision of the New Mexico Court of Appeals is not based on the denial of any constitutional claim advanced by Petitioner or on the interpretation of any constitutional claim in favor of the Journal defendants 7

II. The Court of Appeals' decision is not inconsistent with this Court's decision in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) 9

III. The Court of Appeals' decision is consistent with this Court's ruling in *Gertz* that state courts have considerable latitude in developing their law of defamation so long as the first amendment is not violated 10

IV. The decision of the lower state court here is bereft of judicial importance 11

CONCLUSION 12

Appendix ..... App. 1

TABLE OF AUTHORITIES

Page No.

CASES:

Gertz v. Welch, 418 U.S. 323 (1974) 10, 11

Michigan v. Long, 463 U.S. 1032 (1983) 8

Paul v. Davis, 424 U.S. 693 (1976) 8

State v. Hernandez, 95 N.M. 125, 619 P.2d 570 (Ct. App. 1980) 6

State ex rel. Bardacke v. New Mexico Fed. Savings & Loan Ass'n, 102 N.M. 673, 699 P.2d 604 (1985) 2

Stover v. Journal Publishing Co., 105 N.M. 291, 731 P.2d 1335 (Ct. App. 1985), *cert. quashed*, 105 N.M. 290, 731 P.2d 1334 (1987) 2, 3, 4, 5, 8

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 9, 10

OTHER AUTHORITIES:

Restatement (Second) of Torts § 611 comment c (1977) 5, 7, 9

N.M. 2d Judicial Dist. R. 13(d)(2) 2

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STATEMENT OF THE CASE

On May 31, 1978, one William Marchiondo sued the Journal Publishing Company[1] and others (hereinafter col-

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[1] Subsidiaries of the Journal Publishing Company are defendant Albuquerque Publishing Company, Magnum Systems, Inc., Starline Printing, Inc., Research & Polling, Inc., Corporate Security & Investigations, Inc., and Data Processing & Engineering, Inc., all New Mexico corporations; Journal Center Corporation, a Delaware corporation; Albuquerque Journal Publishing Company-El Paso, a Texas corporation; and Centurion Services, Ltd., a New York corporation.

lectively referred to as the Journal defendants) for libel over the publication of a newspaper article allegedly linking Marchiondo to organized crime. During discovery in support of its defense of truth, the Journal defendants located a federally-protected witness named Jerome Sternlieb, who had firsthand information establishing Marchiondo's connection with organized crime in New Mexico.

Sternlieb had a track record of giving law enforcement officials valuable information on organized crime. As a federally protected witness, Sternlieb could not be easily subpoenaed and was not readily available for interviews by counsel. To facilitate Marchiondo's preparation for depositions of such witnesses, the trial court established a procedure under which the Journal defendants were required to file a pre-deposition affidavit disclosing the substance of the witness' anticipated testimony. On December 14, 1981, the district court ordered the Journal defendants to obtain Sternlieb's affidavit before taking his deposition. *See* Statement of Material and Uncontested Facts in Support of Defendant's Motion for Summary Judgment at ¶¶ 2-8, *Stover v. Journal Publishing Co.*, No. CV-84-02412 (N.M. Dist. Ct. Apr. 15, 1985) [hereinafter Uncontested Facts] [reproduced in Appendix A].[2]

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[2] The Journal defendants have cited their "Statement of Material and Uncontested Facts" because petitioner—by failing to offer controverting facts to the district court—is deemed to have accepted the Journal defendants' statement of facts as true. *See State ex rel. Bardacke v. New Mexico Fed. Savings & Loan Ass'n*, 102 N.M. 673, 675, 699 P.2d 604, 606 (1985); N.M. 2d Judicial Dist. R. 13(d)(2) (party opposing summary judgment must "set forth the material facts as to which the party contends a genuine issue does exist").

On December 18, 1981, the attorneys for the Journal defendants obtained an affidavit setting forth the substance of Sternlieb's anticipated testimony. Sternlieb averred that in late December 1976—early January 1977, he had traveled to Albuquerque with the son of well-known organized crime figure James Napoli and that he had been driven around Albuquerque by Albuquerque Police Chief Bob Stover to see businesses secretly owned by Napoli, Marchiondo, and then-Governor Jerry Apodaca. Sternlieb had made the same allegations concerning Stover to the FBI on July 2, 1980, a year-and-a-half before any representative of the Journal defendants met with him as part of their pretrial discovery in the *Marchiondo* case. *See Stover v. Journal Publishing Co.*, 105 N.M. 291, 292, 295, 731 P.2d 1335, 1336, 1339 (Ct. App. 1985) [reproduced in Petition for Certiorari app. A], *cert. quashed*, 105 N.M. 290, 731 P.2d 1334 (1987); Uncontested Facts at ¶ 9.

On January 12, 1982, counsel for Journal defendants filed the affidavit as directed by the court. The court ordered it sealed but allowed Marchiondo's counsel to provide a copy to former New Mexico Governor Jerry Apodaca and ex-police chief Bob Stover. On January 25 and 26, 1982, the Journal defendants deposed Sternlieb, and the deposition was filed of record with the court. *Stover*, 105 N.M. at 292, 731 P.2d at 1336, Petition for Certiorari app. A at 2; Uncontested Facts at ¶ 16.

On April 12, 1982, an attorney for Apodaca, then a candidate for Democratic nomination for United States Senator, informed the court that Apodaca intended to hold a press conference on April 14, 1982 to release the affidavit and rebut its contents. The court then ordered a hearing

for the afternoon of April 13, 1982. Stover did not personally attend the hearing, but on April 13, 1982, before the hearing or any public report of the affidavit, Stover gave an interview to a reporter from KOAT-TV and discussed on camera certain of Sternlieb's allegations concerning him. *Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 2.

At the hearing, Marchiondo's attorney, at Stover's direction, filed an affidavit from Stover, rebutting the Sternlieb allegations. The court ordered the Sternlieb affidavit unsealed and its contents, along with Stover's rebuttal, were reported extensively that night by KOB-TV, KOAT-TV and KGGM-TV on the evening and late-night news. *Id.*

On April 14, 1982, the Albuquerque Journal reported on the judicial proceeding at which the affidavit was unsealed, including the substance of the Sternlieb affidavit and Stover's denials.[3] *Id.*

On April 12, 1984, Stover filed an action against Journal Publishing Company, Sternlieb, and others employed by the Journal, for defamation based on the Journal's reporting of the affidavit on April 14, 1982. The complaint alleged a conspiracy between these Journal defendants and Sternlieb to procure, file and publish the contents of Sternlieb's allegedly false affidavit. On January 18, 1985, Stover asked for leave to amend his complaint and delete any allegations of conspiracy or collusion between Sternlieb and the Journal defendants to create and publish a

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[3] The Albuquerque Journal maintained a strict separation between its newsgathering function and the conduct of the Marchiondo litigation. *See Stover*, 105 N.M. at 296, 731 P.2d at 1340, Petition for Certiorari app. A at 8.

false affidavit. The district court entered an order dismissing with prejudice any causes of action or allegations of conspiracy to publish a false affidavit and dismissing Sternlieb and three Journal defendants with prejudice. *See id.* at 295, 731 P.2d at 1339, Petition for Certiorari app. A at 7; Complaint for Libel, *Stover v. Journal Publishing Co.*, No. CV-84-02412 (N.M. Dist. Ct. Apr. 15, 1985); Motion for Leave to Amend Complaint, *Stover;* Order Granting Leave to File Amended Complaint, *Stover* (filed Mar. 5, 1985).

On Journal defendants' motion for summary judgment, the district court ruled that the Sternlieb affidavit had been germane to the *Marchiondo* case and that the April 14 article had been a fair and accurate report of the judicial proceeding at which the Sternlieb affidavit was unsealed. The district court further ruled (1) that New Mexico would adopt the exception to the fair report privilege for self-reported statements as set forth in *Restatement (Second) of Torts* § 611 comment c (1977), and (2) that the exception applied even to reports of testimony of a non-party witness discovered by the party who fairly and accurately reports the judicial proceeding in which the testimony is given. The district court denied summary judgment on the publication of the April 14 article, and certified the issue for interlocutory appeal.[4] *See Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 3-4. At no time in the district court did Stover argue that the exception in comment c was constitutionally mandated.

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[4] The district court granted summary judgment on Stover's cause of action based on the filing of the Sternlieb affidavit on the ground that an absolute privilege protected statements made in the course of judicial proceedings. *See Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 3.

The New Mexico Court of Appeals accepted the certification on the applicability of comment c to the facts of this case and on no other issues decided at summary judgment.[5] *See id.* It then assumed that New Mexico would recognize the exception to the report privilege set forth in comment c but ruled that New Mexico would not apply the exception to the specific facts of this case since Sternlieb, not the Journal defendants, had made the statements fairly and accurately reported on April 14. The court thus limited the application of the exception in comment c to statements made by a party, not by a witness. The Court of Appeals did not base its decision or its construction of the report privilege on any federal constitutional right but rather ruled that New Mexico's common law of defamation would not recognize an exception to the report privilege for the circumstances of this case. *See id.* at 295-97, 731 P.2d at 1339-41, Petition for Certiorari app. A at 6-9.

The New Mexico Supreme Court granted certiorari to review the decision of the Court of Appeals and issued an opinion which petitioner greatly relies on here. This opinion was withdrawn, the writ of certiorari quashed, and the case remanded to the Court of Appeals. *See* Petition for Certiorari apps. B-C. On February 11, 1987, the mandate of the Court of Appeals was returned to the district court. On August 6, 1987, the district court entered final judgment in favor of defendants.

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[5] New Mexico's statute on interlocutory appeals requires both that the district court certify and that the reviewing court accept the issues certified before any issue can be entertained in any interlocutory appeal. *See, e.g., State v. Hernandez,* 95 N.M. 125, 126, 619 P.2d 570, 571 (Ct. App. 1980).

ARGUMENT

I. The decision of the New Mexico Court of Appeals is not based on the denial of any constitutional claim advanced by Petitioner or on the interpretation of any constitutional claim in favor of the Journal defendants.

In this case the Court of Appeals did not deny any federal constitutional claim advanced by petitioner, nor did it base its decision on any constitutional right asserted by the Journal defendants. Quite simply, the Court of Appeals reached its decision by construing New Mexico's common law, not the United States Constitution.

The Court of Appeals ruled that even if comment c to § 611 of the *Restatement (Second) of Torts* does apply in New Mexico, it does not apply where a witness' in-court statement is fairly and accurately reported by the party locating him. By so ruling, the court avoided having to decide the Journal defendants' contention that an exception to the report privilege in the circumstances of this case would violate freedom of speech and press under the first amendment. The Court of Appeals ruled:

> The parties have also argued the certified question on the basis of the First Amendment's guarantees of freedom of speech and freedom of the press. Because the question can be answered under the common law, we need not reach the constitutional issue. Courts will not decide constitutional questions unless necessary to the disposition of the case.

105 N.M. at 296-97, 731 P.2d at 1340-41.[6] The Court of Appeals interpreted the common law of the State of New

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[6] Thus this case does *not* present a judgment which has been based on a federal constitutional ground but which can

(Continued on following page)

Mexico to preclude the application of the exception in comment c to the case at bar and specifically eschewed reliance on or interpretation of the federal constitutional claims presented. Its decision was based exclusively on its interpretation of New Mexico's common law of libel.[7]

Furthermore, petitioner does not contend that the Court of Appeals denied any federal constitutional right in interpreting the report privilege as it did. In the district court and in the New Mexico Court of Appeals, petitioner did not claim that his vision of the parameters of comment c was constitutionally required. Nor could he. This Court has previously ruled that a reputational interest under state law is not a liberty or property interest under the due process clause of the fourteenth amendment. *See Paul v. Davis,* 424 U.S. 693 (1976). The states are

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(Continued from previous page)

be supported as well by an independent state ground. *See, e.g., Michigan v. Long,* 463 U.S. 1032 (1983). Here, the lower state court did not purport to rule on any federal claim at all but decided the case exclusively under the state's common law.

7 The only federal constitutional claims on appeal were advanced by the Journal defendants. As a review of his brief demonstrates, petitioner clearly did not argue that the United States Constitution required an exception to the fair report privilege. Petitioner's discussion of the first amendment was exclusively in the context of rebutting the Journal defendants' claims that the exception urged by petitioner would violate the first amendment and deny them equal protection under the fourteenth amendment. *See* Appellee's Answer Brief on Interlocutory Appeal at 22-30, *Stover.* The Court of Appeals found it unnecessary to rule on the constitutional claims since it held that New Mexico's common law did not provide for an exception under the circumstances of this case.

free to develop the contours of their common law privileges so long as they are consistent with the first amendment.

At most, petitioner complains that the New Mexico Court of Appeals has misconstrued both the *Restatement (Second) of Torts* and *Webster's New Collegiate Dictionary*. *See* Petition for Certiorari at 8-9. Even if such an error could be demonstrated, it would not implicate a federal constitutional right.

II. The Court of Appeals' decision is not inconsistent with this Court's decision in Time, Inc. v. Firestone, 424 U.S. 448 (1976).

Although petitioner's statement of the "question presented for review" is devoid of any reference to any constitutional right which he was denied by the ruling of the Court of Appeals, he argues that *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), is somehow contrary to the decision of the New Mexico Court of Appeals. *Time, Inc. v. Firestone* simply has no application to this case. The nub of the libel in *Firestone* was Time's report that Mr. Firestone had been granted his divorce on the ground of adultery.[8] Since Mrs. Firestone had been granted alimony, which could not have been awarded under state law to a party who had committed adultery, the lower court found, and this Court agreed, that the report in *Firestone* was "inaccurate and false." 424 U.S. at 455. Had Time's report been fair and accurate, it would have been absolutely protected under Florida's report privilege.

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[8] The excerpt set forth on page 7 of the Petition for Certiorari was not the portion of the report which Mrs. Firestone claimed was libelous. *See* 424 U.S. at 458-59.

In sum, *Firestone* did not involve the fair and accurate report of a judicial proceeding but a misleading and inaccurate report unprotected by the report privilege. Here, the district court determined that the April 14 report of the judicial proceeding was fair and accurate. Thus, the decision of the New Mexico Court of Appeals is consistent with *Firestone*.

III. The Court of Appeals' decision is consistent with this Court's ruling in Gertz that state courts have considerable latitude in developing their law of defamation so long as the first amendment is not violated.

Petitioner contends that the New Mexico Court of Appeals' decision "is in conflict with this Court's development of the law of libel." This Court's decisions in the area of defamation have not developed the substantive law of libel beyond prescribing the constitutional minima below which the states cannot impose liability. *Gertz v. Welch*, 418 U.S. 323 (1974), clearly left the states free to develop greater protection for the press under their common law than is required by the first amendment:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Id. at 347. Neither *Firestone* nor any other decision of this Court limits a state's power to develop its own common law of defamation, so long as the minimal protection afforded by the first amendment is not breached. Petitioner confuses the minimal requirements which the first amendment commands with the more stringent require-

ments which a state, in its wisdom, may adopt consistently with *Gertz*.

IV. The decision of the lower state court here is bereft of judicial importance.

In essence, petitioner is asking this Court to act as a final arbiter of a development in state tort law which in no way implicates any constitutional right or claim. Petitioner's quarrel with New Mexico law does not concern an issue of broad and predominating public interest or far-reaching application to a vast number of cases arising in the state and federal courts. The critical issue in this appeal involved the interpretation of an obscure exception to the report privilege on which a dearth of case law exists. New Mexico's resolution of the issue may be of some passing interest to scholars in the law of libel but is hardly of supervening jurisprudential interest or of special import to the federal or state judiciary.

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CONCLUSION

This case is clearly not one which involves an issue of profound public interest or which will have application to a vast array of cases, and in no way does it concern the 200-year-old document that this Court is sworn to protect. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

BOB STOVER, Plaintiff,	)	
vs.	)	NO. CV-84-02412
JOURNAL PUBLISHING COMPANY, ALBUQUERQUE PUBLISHING COMPANY, THOMPSON H. LANG, GERALD CRAWFORD, JOHN H. DONOHUE, WILLIAM HUME and JEROME STERNLIEB, Defendants.	)	(Feb. 25, 1985)

STATEMENT OF MATERIAL AND UNCONTESTED FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. THE *MARCHIONDO V. BROWN* CASE RAISED ISSUES CONCERNING MARCHIONDO'S CONNECTION TO ORGANIZED CRIME AND HIS POLITICAL INFLUENCE IN NEW MEXICO.

1. On June 13, 1975, William C. Marchiondo filed an action for libel against Robert A. Brown, Ralph Looney, Albuquerque Tribune, Albuquerque Journal, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, Scripps-Howard Publishing Company, and unnamed John and Jane Does. The basis of the libel action was the publication of two editorials and an advertisement attached to the original complaint as exhibits. One of the editorials, endorsing Apodaca's opponent for

Governor, described Marchiondo "[a]s a criminal lawyer . . . [who] thrives by having friends in key places." The advertisement, sponsored by the Republican Party, stated that "Jerry Apodaca would be the kind of Governor who would appoint Billy Marchiondo as chairman of the New Mexico Racing Commission. That's why we say he's the man nobody can afford."[1]

2. On approximately May 31, 1978, Mr. Marchiondo filed an amended complaint of libel based on an article published in the *Albuquerque Journal* on March 26, 1977. The headline of the article read, "Organized Crime Showing Interest in New Mexico" and the article reported among other things Marchiondo's close association with New York organized crime leader James Vincent Napoli, Sr.[2]

3. The amended complaint alleged that this article "was calculated to convey the impression that plaintiff was connected with organized crime in New Mexico and defendants intended to mean and meant that plaintiff was associated with the Mafia."[3]

4. The *Marchiondo* case went to trial based on the alleged libel in the article of March 26, 1977. Although Marchiondo's claims based upon the prior articles had been dismissed, Marchiondo successfully introduced these articles into evidence at trial as proof of the defendants' state of mind.[4]

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1 Exhibit A, Complaint and two attachments.

2 Exhibit B, Amended Complaint and article.

3 *Id.*

4 Exhibit C, Newspaper Articles.

II. IT WAS THE PRACTICE ESTABLISHED BY JUDGE TRAUB IN THE *MARCHIONDO V. BROWN* LITIGATION TO REQUIRE THE DEFENDANTS TO PROVIDE AFFIDAVITS OF WITNESSES WHO WERE IN THE JUSTICE DEPARTMENT'S WITNESS PROTECTION PROGRAM BEFORE DEPOSING THEM.

5. During the course of litigation in the *Marchiondo* case, it became necessary to depose certain witnesses in the U. S. Justice Department's Witness Protection Program. In order to protect these witnesses from reprisals from criminal defendants against whom they were testifying, they had been given new identities and had been relocated to secret residences by the U.S. Marshall Service. For that reason, unlike other witnesses, they were not readily accessible by subpoena if the plaintiff desired additional deposition sessions; nor were they available for interviews by opposing counsel. "[I]n order to give counsel for the other side the substance of what the individual would testify about," Judge Traub established a practice in *Marchiondo v. Brown* that before witnesses in the Justice Department's Witness Protection Program could be deposed, an affidavit first had to be provided to the plaintiff setting forth the witness' anticipated testimony.[5] The purpose of this practice was to provide plaintiff's counsel with ample opportunity to prepare for cross-examination of the witness. The practice of requiring affidavits prior to the depositions obviated the need for additional deposition sessions which would have been

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[5] Exhibit D, Dines' Deposition, pp. 34-37 and 40-42 and Exhibit E, In-Camera Transcript of Proceedings, December 14, 1981, pp. 4-5.

difficult to arrange due to the witnesses' enrollment in the Witness Protection Program.

6. This practice began with the affidavit of Aladena T. Fratianno, which was taken by the defendants on November 13, 1980,[6] prior to his deposition on January 8, 1981, in California.[7] It was followed in deposing Jerome Sternlieb and later in deposing Norman B. Duncan on June 26, 1982.[8]

III. IN ACCORDANCE WITH THE PRACTICE ESTABLISHED BY THE COURT JUDGE TRAUB ORDERED THE DEFENDANTS TO FILE AN AFFIDAVIT OF JEROME STERNLIEB.

7. On December 14, 1981, Thompson Hughes Lang, a defendant in the *Marchiondo* case, was deposed by the plaintiff. When asked if there were "other witnesses that you or the Journal Publishing Company have access to, or know of, of people who claim to have knowledge of the exercise of influence by William Marchiondo on any state officials at all besides Norman Duncan,"[9] Mr. Lang declined to answer, and an *ex parte, in camera* session was held between the defendants' attorneys, Eric Lanphere and Jim Dines, and Judge Traub. At that time the attorneys explained to Judge Traub that the defen-

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6 Exhibit F, Fratianno's Affidavit and Exhibit D, Dines' Deposition, pp. 161-6.

7 Exhibit G, cover page of Fratianno's Deposition.

8 Exhibit H, Duncan's Affidavit; Exhibit I, Transmittal Letter; and Exhibit J, cover page of Duncan's Deposition.

9 Exhibit K, Lang's Deposition, (*Marchiondo* case), pp. 73, 81-2.

dants did not want to disclose the identity of a particular person (who was later disclosed to be Jerome Sternlieb) because of a concern for his physical safety. The attorneys explained that this potential witness was "in great fear of his life," that he was in the Justice Department's Witness Protection Program, and that it was then uncertain whether arrangements could be made "to come out in the open with his name."[10]

8. In keeping with the practice initiated with the Fratianno deposition, Judge Traub stated:

> I take it before you would depose this witness, you would if everything goes according to your plan, secure an affidavit from him, file it with the court, and give a copy of it to the plaintiff's attorneys so that they are alerted as to what the deposition is going to be all about . . . [so] they would then at least know the subject of what the deposition is about, so they can cross-examine.[11]

The Court then ruled in open court that Mr. Lang did not have to disclose the identity of the witness until such time as the witness signed an affidavit to be filed with the Court and served it upon the plaintiff. The Court held as follows:

> Mr. Lang does not have to disclose the name, address or whereabouts, or any other information concerning the witness, and that no such information will have to be disclosed until such time as the witness signs an affidavit *which will be filed in the court file;* copy, of course to plaintiff's counsel sufficiently in advance of his deposition, which is anticipated will be taken at

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[10] Exhibit E, In-Camera Transcript of Proceedings, December 14, 1981, p. 3.

[11] *Id.*, pp. 4-5.

> some time in the case prior to trial, and this will alert the plaintiff as to who he is and what the substance of his testimony is expected to be. (Emphasis added.)[12]

9. Four days later, on December 18, 1981, Sternlieb's affidavit was taken, but because of a delay caused by arranging for the security precautions for his deposition, his affidavit was not filed until January 12, 1982.[13] Sternlieb's affidavit was also filed as an attachment to the affidavit of Thompson H. Lang of January 12, 1982,[14] in direct response to the plaintiff's Motion for Disclosure and Deposition of Informant, which had been filed on December 30, 1981 and plaintiff's Motion for Production of Documents, also filed on that date, which sought, among other things, the production of all documents relating to "the alleged confidential information/witness, disclosed during the deposition of defendant Thompson Hughes Lang."[15]

10. The Sternlieb Affidavit was filed in Judge Traub's chambers in the presence of the Court and plaintiff's counsel, Ernesto Romero.[16] At the request of plaintiff's counsel, Judge Traub sealed the Sternlieb Affidavit and ordered the parties to refrain "from disclosing the contents of the affidavit."[17] The Court, however, did per-

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12 Exhibit K, Lang's Deposition, pp. 85-6.

13 Exhibit D, Dines' Deposition, pp. 67-68 and Exhibit L, Transcript of Proceedings, January 12, 1982.

14 Exhibit M, Lang's Affidavit of January 12, 1982.

15 Exhibit N, Motion for Disclosure and Deposition of Informant; and Motion for Production of Documents.

16 Exhibit L, Transcript of Proceedings, January 12, 1982, pp. 12-14.

17 *Id.*

mit the plaintiff to "discuss . . . the contents of the affidavit with . . . parties whose names are mentioned in it,"[18] "provided that they were cautioned concerning the Court's instruction."[19]

IV. THE INFORMATION CONTAINED IN THE STERNLIEB AFFIDAVIT CONCERNING STOVER WAS RELATED DIRECTLY TO THE DEFENDANTS' TRUTH DEFENSE IN *MARCHIONDO V. BROWN*.

11. As Stover acknowledged in his deposition, "one of the issues in the [Marchiondo] lawsuit was Mr. Marchiondo's connection to organized crime."[20] Accordingly, the existence of organized crime in New Mexico, and Marchiondo's connection with it, was part of the defendant's truth defense. Sternlieb's testimony supported this defense. Sternlieb's affidavit alleged that Marchiondo secretly owned property in Albuquerque in a hidden partnership with Governor Apodaca and James Napoli, Sr., a leading organized crime figure from New York. It alleged further that Chief of Police Stover was familiar with these hidden interests, as evidenced by the fact that he drove Sternlieb and Napoli's son on a tour of these secretly owned businesses.

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18 *Id.*, p. 15. In that connection Mr. Romero showed the Affidavit to Stover on the evening of January 12, 1982 (see Exhibit Q, Stover's Deposition, (*Stover* case), pp. 299, and 305 and Exhibit P, Romero's Deposition, pp. 72-6) and Governor Apodaca was provided with a copy on March 26, 1982, through his wife, Clara Apodaca, (Exhibit P, Romero's Deposition, p. 87).

19 Exhibit P, Romero's Deposition, p. 28; Exhibit O, Letter from Romero to Clara Apodaca.

20 Exhibit Q, Stover's Deposition, pp. 107-13.

12. In his deposition, Stover specifically admitted that allegations of such an illicit partnership related to the issues in the *Marchiondo* case. Stover acknowledged that in his experience "as a . . . law enforcement officer," "[i]n determining whether or not Mr. Marchiondo was connected to organized crime figures," it was " . . . also relevant to understand the full extent of Mr. Marchiondo's connections to organized crime." In that regard, Mr. Stover admitted that "if it were true that Mr. Marchiondo had the chief of police of Albuquerque, New Mexico, picking up two organized crime figures . . ., that would certainly be a relevant fact in determining Mr. Marchiondo's connection and influence with organized crime."[21]

13. The universally recognized fact that organized crime cannot flourish without the tacit approval and complicity of local law enforcement officials underscores the relevance of the allegation that the Police Chief was knowledgeable about Marchiondo's organized crime connections and his hidden ownership of businesses in partnership with a leading organized crime figure. Mr. Lang recognized this fact at the time he first met Sternlieb.[22] In addition, it is a fact testified to in this case by retired FBI Agent James Doyle. Doyle, who had 28 years of experience in investigating organized crime and who was hired by Governor Apodaca to investigate Jerome Sternlieb in April, 1982, after his affidavit was unsealed,[23] is the former head of the Organized Crime Unit in the FBI's Albuquerque Field Office.

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21 Exhibit Q, Stover's Deposition, pp. 112-13.

22 Exhibit R, Lang's Deposition (*Stover* case), pp. 138-41, 173-74.

23 Exhibit S, Doyle's Deposition, pp. 7-13, 18-20.

14. The "complicity on the part of law enforcement for organized crime to survive"[24] was particularly relevant with reference to Marchiondo because, prior to meeting Sternlieb, the defendants had obtained solid evidence that it was the established *modus operandi* between Napoli and Marchiondo to include law enforcement officials in their schemes. This evidence consisted of a tape-recorded conversation between Napoli and Marchiondo at the Tombs Prison in New York City on March 15, 1975. This conversation was recorded on a bodywire worn by Ralph Grano, a corrections official who was working on an undercover investigation of Napoli. In that conversation Napoli suggested to Marchiondo and Marchiondo agreed, that the way to operate successfully in Las Vegas, Nevada is to get the involvement of law enforcement, in particular the sheriff in Las Vegas, Nevada. In that connection Napoli stated to Marchiondo:

> You first gotta make a contact with that guy that runs that town. That's the sheriff . . . right? Now, once you got him, now, listen, keep you nose clean, let me run it the way I want it. I don't wanna give ya so much a week. I wanna give you an interest in the joint. Nobody has to know. You got so many damn things going through here. Keep the fuckin coppers outta here. Let me invite my friends here.[25]

15. This same tape recording evidenced a relationship between Napoli and law enforcement in New Mexico. The Attorney General is the highest law enforcement officer in New Mexico. On the tape both Napoli and Marchiondo

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24 Exhibit R, Lang's Deposition, p. 138.

25 Exhibit T, tape-recorded conversation ("Tombs Tapes") of March 15, 1975 participated in by Grano, Marchiondo, and Napoli, p. 105.

discussed their friendship with former New Mexico Attorney General Boston Witt.[26] In fact, the defendants prior to meeting Sternlieb had in their possession a report of a surveillance conducted by the FBI and the Albuquerque Police Department of a meeting in New Mexico attended by Marchiondo, Napoli and Witt in August, 1972.[27] In that same tape-recorded conversation Marchiondo and Napoli also discussed business dealings they then had with former New Mexico Attorney General David Norvell. These business dealings were connected with George Dermksian (also known as "The Shoe"), a well known organized crime associate from Rhode Island.[28] At the time the Defendants first met Sternlieb, Dermksian had been convicted in New Mexico of multiple counts of bank fraud in connection with the business dealings which Marchiondo and Napoli had discussed on the tape.[29] When deposed in the *Marchiondo* case, Dermksian admitted meeting Norvell in 1975, in the presence of Marchiondo while Norvell was Attorney General.[30]

V. ON THE BASIS OF STERNLIEB'S AFFIDAVIT, HIS DEPOSITION WAS TAKEN

16. Less than two weeks after the affidavit was filed, on January 25 and 26, 1982, Sternlieb's deposition was taken in Washington, D.C. The defendants paid for Stover's trip to Washington, D.C. to attend the deposition so

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26 *Id.*, p. 23.

27 Exhibit U, Surveillance Report.

28 Exhibit T, Tombs Tapes, pp. 20-1.

29 Exhibit V, Dermksian Trial Verdicts on 6 counts.

30 Exhibit W, Dermksian's Deposition, pp. 9-11.

that he could confront Sternlieb and "have an opportunity to ask questions of him."[31] Prior to the deposition, Stover reported back to the defendants' attorneys that he could not find any appointment calendars, "nor did I have anything else to offer."[32] As reflected by the record, Sternlieb's deposition testimony basically tracked his affidavit. During the deposition Sternlieb was extensively cross-examined about Stover.[33]

VI. AT THE INITIATION OF FORMER GOVERNOR JERRY APODACA AND WITHOUT OPPOSITION FROM STOVER, JUDGE TRAUB ORDERED THE STERNLIEB AFFIDAVIT UNSEALED.

17. On April 12, 1982 Judge Traub notified the parties in the *Marchiondo* case by letter that he had "received an unsolicited call from Mr. James Toulouse advising that his client, former Governor Apodaca, intends to release to the press on Wednesday, April 14, 1982, a copy of the Sternlieb affidavit."[34] Apodaca, then a candidate for the Democratic nomination for the U.S. Senate, decided to release Sternlieb's affidavit purely for political reasons to take the offensive on these allegations before they became public.[35]

18. Immediately after receiving Judge Traub's letter the defendants in that case filed a motion to unseal the Sternlieb affidavit. That motion was heard before Judge

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31 Exhibit R, Lang's Deposition, p. 145.

32 Exhibit Q, Stover's Deposition, p. 363.

33 Exhibit X, Sternlieb's Deposition, pp. 173, 199-202, 206.

34 Exhibit Y, Judge Traub's Letter.

35 Exhibit Z, Toulouse's Deposition, pp. 26-7 and 31.

Traub on April 13, 1982, and was granted without opposition from Marchiondo or Apodaca.[36] Despite the fact that Stover had been specifically advised by Mr. Apodaca's attorney of this proceeding and that he had a right to appear and oppose the unsealing of the Affidavit, Stover for some unexplained reason chose not to attend.[37] Instead, he drafted an affidavit with the assistance of Mr. Romero, Marchiondo's attorney, denying Sternlieb's allegations.[38] At Stover's direction, Mr. Romero filed Stover's affidavit with the Court during the April 13th proceedings.[39] Attached to Stover's affidavit was a copy of Sternlieb's affidavit. Also, in the early afternoon of April 13, 1982, prior to the unsealing of the affidavit, Stover was interviewed by a reporter from KOAT-TV and discussed on camera Sternlieb's specific allegations concerning him.[40]

19. The news story about Sternlieb's affidavit and Stover's denials were carried that evening on KOB-TV, KOAT-TV and KGGM-TV.[41]

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36 Exhibit AA, Transcript of Proceedings, April 13, 1982.

37 Exhibit Z, Toulouse's Deposition, pp.34-8, and Exhibit AA, Transcript of Proceedings, April 13, 1982, p. 2.

38 Exhibit BB, Stover's Affidavit and Exhibit Q, Stover's Deposition, pp. 468-9, 471-4, 478-9, 496.

39 Exhibit AA, Transcript of Proceedings, April 13, 1982, pp. 12-13.

40 Exhibit CC, Conroy Chino's Deposition, pp. 10-11.

41 Exhibit DD, Ralph Green's Deposition, p. 5, and Ex. A; Exhibit EE, Andrew Hebenstreit's Deposition, p. 6 and Ex. A; and Exhibit FF, John McKean's Deposition, p. 6, and Ex. B, pp. 1-4.

VII. THE DAY AFTER JUDGE TRAUB UNSEALED THE STERNLIEB AFFIDAVIT, ITS CONTENTS WERE PUBLISHED IN THE ALBUQUERQUE JOURNAL.

20. The article which is the subject of this lawsuit, entitled, "Affidavit Says Apodaca Took Bribe," reported on the front page of the *Albuquerque Journal* the unsealing of the Sternlieb Affidavit and recounted its allegations and the rebuttal contained in Stover's affidavit. It was written by the reporter who regularly covers the Albuquerque Courthouse.[42] In fact, there was a strict policy imposed by Lang separating the defense of the *Marchiondo* lawsuit from the *Journal's* newspaper reporting functions. "I made the decision that we would keep complete separation between the circumstances involving the lawsuit, and any discovery thereof, and the editorial process."[43] Next to the text of that article were the photographs of Napoli, Sr. and Napoli, Jr., Stover and Apodaca. All four were the principal individuals singled out by Sternlieb in his affidavit. As Gerald Crawford, Editor of the *Albuquerque Journal,* and a defendant in this case, testified in his deposition, the fact of the Sternlieb affidavit in the *Marchiondo* case was a significant news story for several reasons. First, two of the individuals who were the subjects of Sternlieb's allegations were candidates for high public office in New Mexico. Apocada was a candidate for the Democratic nomination for the U.S. Senate, and Stover was the Republican candidate for Sheriff of Bernalillo County. That both candidates might be connected to or-

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42 Exhibit R, Lang's Deposition, p. 104 and Exhibit GG, Crawford's Deposition, pp. 14-15, 19 and 42.

43 Exhibit R, Lang's Deposition, pp. 105-6.

ganized crime was obviously of extreme public significance. Second, Apodaca had made Sternlieb's affidavit a highly charged news story by scheduling a press conference to release his allegations and by circulating petitions for a Grand Jury to be impanelled to investigate John Donohue, the *Albuquerque Journal* and Sternlieb with respect to Sternlieb's affidavit. Similarly, Stover had fueled the newsworthiness of the story by filing his own affidavit which denied that he had ever driven Sternlieb and Napoli, Jr. around Albuquerque and which attacked Sternlieb's credibility. Third, the fact that Apodaca, and perhaps Stover, wanted the Sternlieb affidavit released made the unsealing a newsworthy story.[44]

21. Crawford also testified that this news article "report[ed] . . . a court proceeding." Unlike an investigative piece, it did not seek to prove that anyone was connected to organized crime. As Crawford testified, with respect to court proceedings, the *Journal's* job "is to report as accurately and as balanced and fairly as possible . . . the information as it's presented."[45]

22. Crawford reviewed the story to satisfy himself that it "was a fair and objective report of what . . . [he] had been told had transpired," in the court proceeding. "[T]o make sure . . . [there was] a balanced story," he instructed a reporter to telephone Adopaca, who refused to comment, and a reporter to contact Stover, who chose not to elaborate beyond his affidavit.[46]

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44 Exhibit GG, Crawford's Deposition, pp. 25-9.

45 *Id.*, pp. 25-6.

46 *Id.*, pp. 26-7.

23. Crawford took pains to make the report of the Sternlieb Affidavit, as it emerged in the court proceedings, a model of fairness and balance. Each of Sternlieb's allegations was balanced with Stover's denials in his public affidavit. At the outset of the article is Stover's claim that "the affidavit is absolutely false" and his statement that "everything in his [Sternlieb's] affidavit concerning me was an outright lie."[47] Further into the article Stover is quoted as stating, "I did not know Jerome Sternlieb; I have never met him and everything in his affidavit was an outright lie." Stover's unqualified denial was again further emphasized toward the end of the article where Stover is quoted as stating that "he is neither a social nor business associate of Apodaca or Marchiondo, and I think the Sternlieb affidavit is a fabrication and a complete and outrageous lie." Crawford also wanted to be certain the article was "right up front about Sternlieb and the fact that he was a convicted felon."[48] At three points in the article it is reported that Sternlieb is a "convicted felon." This point is emphasized at the end of the article by the statement that Sternlieb "has been convicted of interstate mail fraud, wire fraud and the issuing of worthless checks."

24. Of the fifty-eight paragraphs in the April 14, 1982 article, all but six contain statements or information from the court record, including Sternlieb's affidavit, Stover's affidavit, Sternlieb's deposition and factual in-

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47 See *Journal* article, April 14, 1982, attached to the Complaint.

48 Exhibit GG, Crawford's Deposition, p. 32.

formation concerning the posture of the lawsuit. The first of these six paragraphs states that

> Apodaca said he would answer the accusations and other allegations in the affidavit today with substantial evidence.

This quote was elicited at the initiation of Mr. Crawford.

25. There are four paragraphs which quote Mr. Lang in response to the statements in Stover's affidavit. Stover states in his affidavit that he "offered to take a lie detector test or any other kind of truth test, but the *Journal* refused his offer."[49] Mr. Lang was quoted to provide the reader with an accurate picture of Mr. Stover's dealings with the *Journal*. In that connection, the statements of Mr. Lang make it clear that the *Journal* did not stop Stover from taking a lie detector test, that Stover was asked by the *Journal* to provide substantial evidence to disprove Sternlieb's allegations[50] and that Stover had attended Sternlieb's deposition at the expense of the Journal, a fact which Stover conveniently omitted from his affidavit. Stover, in his deposition, had either acknowledged or not contested the truth of any of these statements by Lang.[51]

26. As Stover conceded in his deposition, his affidavit also included a misrepresentation regarding answers given to questions asked of Jerome Sternlieb at his deposition.[52] Stover asserted in his affidavit that Sternlieb

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49 Exhibit BB, Stover's Affidavit, p. 2, paras. 5-6.

50 Indeed, Stover testified that Lang had "implored" him for such evidence. (Exhibit Q, Stover's Dep., pp. 336-340, 369.)

51 Exhibit Q, Stover's Deposition, p. 339.

52 *Id.*, p. 488.

had picked out his picture at a meeting at which only Donohue and Sternlieb were present.[53] Stover now admits —and Sternlieb's deposition testimony clearly establishes —that Stover's picture was picked out at the December 18, 1982, meeting during which Sternlieb's affidavit was taken.[54] This meeting was attended by Eric Lanphere, an attorney for the Albuquerque Journal, Martha Hill, secretary to Jim Dines, and John Donohue. Mr. Donohue's statement in the April 14th article corrects Stover's admittedly untrue statement regarding that meeting.

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We hereby certify that a copy of the foregoing pleading was hand delivered to opposing counsel of record this 25th day of February, 1985.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
By /s/William S. Dixon

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53 Exhibit BB, Stover's Affidavit, p. 5, para. 13.

54 Exhibit Q, Stover's Deposition, pp. 487-9.